Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CHESTER HOLLMAN,

Petitioner,

vs.

HARRY E. WILSON II, SUPERINTENDENT, RETREAT;
OFFICE OF DISTRICT ATTORNEY OF PHILADELPHIA;
ATTORNEY GENERAL OF PENNSYLVANIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

NORRIS E. GELMAN
Attorney for Petitioner
The Public Ledger Building
620 Chestnut Street
Suite 940
Philadelphia, Pennsylvania 19106
(215) 574-0513

149728

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED FOR REVIEW

I. Where police negligence in the retrieval of a critical witness' criminal record resulted in the prosecutor providing defense counsel with a record for that witness which revealed no prior convictions for felonies or misdemeanors (when in fact there were ten such convictions) and because of this negligence the witness was able to perjure himself before the jury on three occasions by stating he had never been convicted of any felonies or misdemeanors, did the Third Circuit correctly find that there had been no *Brady* violations, that the negligence excused the failure to provide the defense with the prior record of the witness, and that the confidence required by *Kyles* could be placed in the verdicts returned even though the verdicts may well rest in whole or in part on testimony bolstered by perjured testimony?

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The Petitioner Chester Hollman respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit which was entered in the above-entitled case on September 11, 1998.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit, entitled *Hollman v. Wilson*, is reported at 158 F.3d 177 (3d Cir. 1998) and is included in the appendix attached hereto at pages 1a-12a.

Judge Pollak's Order dated November 24, 1997 adopting the Report and Recommendation of the Magistrate without discussion is included in the appendix at page 13a. Judge Pollak granted a certificate of appeal in this Order. Magistrate Judge Thomas Reuter's Report and Recommendation dated November 4, 1997 is also included in the appendix at pages 14a to 24a.

The Pennsylvania Supreme Court's Order dated April 1, 1996 denying Allocatur is in the appendix at page 25a. The July 20, 1995 Order of the Superior Court refusing to Reconsider its May 17, 1995 opinion is found at appendix 26a. The Superior Court of Pennsylvania's unpublished memorandum opinion dated May 17, 1997 is in the appendix at pages 27a to 37a.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Invoking federal jurisdiction under 28 U.S.C. § 2254 and 28 U.S.C. § 1254 petitioner filed a petition for a writ of habeas corpus by a person in state custody in the United States District Court for the Eastern District of Pennsylvania on March 24,

1997. The United States District Judge, The Honorable Louis H. Pollak adopted the Report and Recommendation of the Magistrate and denied the writ, but issued a certificate of appealability on November 24, 1997. The Third Circuit denied relief in a published opinion, *Hollman v. Wilson*, 158 F.3d 177 (3d Cir. 1998). Petitioner did not seek a petition for rehearing.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Nor shall any State deprive any person of life, liberty or property without due process of law . . .

STATEMENT OF THE CASE

A. Proceeding and Disposition in the Courts Below:

Petitioner was tried in the Court of Common Pleas of Philadelphia County before a jury Murder and related crimes. He was convicted of second degree murder which in Pennsylvania is felony murder or a killing committed in furtherance of a felony, here robbery.

Gerald Stein, Esquire represented him at trial. Present counsel entered the case at the post trial motions stage, handled the state court appeals and the habeas proceedings.

Following the denial of post trial motions, Petitioner was sentenced to life in prison.

Petitioner's case has always centered on what he deemed to be a *Brady* violation that was aggravated by the deliberate perjury of the witness to whom the *Brady* violation related.

The main witness against Petitioner was an alleged eyewitness named Andre Dawkins who positively identified Petitioner as being the accomplice of the trigger person who fatally shot the deceased during a robbery.

Dawkins had an extensive record of ten prior convictions for misdemeanors and felonies, one of which was Falsely Incriminating Another — a conviction that by itself, let alone with nine others, would have gone far toward destroying his credibility.[1] These ten convictions were not turned over to the defense because of an error by the police identification unit that failed to identify Dawkins' fingerprints on file after his most recent arrest (within days of Petitioner's trial) and mistakenly gave him a new identification number which prevented the retrieval of his past record of ten convictions. This was police negligence and was variously termed an "administrative mistake" or negligence throughout these proceedings.

This error could have been easily cured by Dawkins on the stand had he admitted to his past criminal career. Dawkins chose to perjure himself three times, and passed himself off as a good citizen by denying his past criminal record, as the Third Circuit found. *Hollman*, note 8.[2]

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1. 18 Pa. C.S.A. § 4906(a) provides:

> (a) Falsely incriminating another. — A person who knowingly gives false information to any law enforcement officer with intent to implicate another commits a misdemeanor of the second degree.

2. Q. [by defense counsel]: Is that all you have on your record, summary offenses?

(Cont'd)

Petitioner's habeas petition was resolved against him by the Third Circuit which held that the police negligence in the retrieval of Andre Dawkins' prior criminal record which led to the false assumption that he had no prior convictions for misdemeanors or felonies when in fact he had ten such convictions did not implicate *Brady v. Maryland*, 373 U.S. 83 (1963). *See Hollman v. Wilson*, *supra*, at note 3 (3d Cir. 1998) (App. 10a).

The Third Circuit also held:

> Without some record evidence that it was something more than a mistake, we cannot conclude that the government withheld information that was readily available to it or constructively in its possession. Accordingly, we find that the government did not withhold Dawkins's [sic] full criminal history and that the failure of the government to produce this material does not constitute a *Brady* violation.

Hollman, *supra*, at (App. 8a).

(Cont'd)

> A. I have summaries. I have a burglary. I ain't been a saint all my life. I just know *I just don't do no wrong*, not in that sense. (N.T. pg. 1267; 31A) (Emphasis supplied).

Shortly thereafter he testified, referring to his open burglary arrest of three days previous:

> A. I signed my own bail because *I don't have a record.* (N.T. pg. 1268) (Emphasis supplied).

Again, referring to his release on bail on his recent burglary arrest he stated:

> A. . . . I don't have a record, and they let me sign myself out . . . (N.T. pg. 1272; 32A) (Emphasis supplied).

As shown *infra*, by excusing the *Brady* violation because of police negligence the Third Circuit ran afoul of *Kyles v. Whitely*, 514 U.S. 419, 437-38, 131 L. Ed. 2d 490, 115 S. Ct. 1555, at 1567 (1995),[3] and resurrected the good faith exception to *Brady* violations that this Court had long rejected.

By requiring "some record evidence that it was something more than a mistake" in order to trigger *Brady* the Third Circuit placed *Brady* on a fault footing — requiring misconduct on the part of the police or prosecutor rather than an administrative mistake or negligence to trigger *Brady*, and again ruled in a manner which is in conflict with this Court's decisions that have always held that it is the impact on the accused that is paramount, not whether or not the prosecution acted in good or bad faith. *Brady*, at 87.

It has always been the character of the evidence and not the character of the prosecutor that rules *Brady* and the values protected by *Brady*. *Smith v. Phillips*, 455 U.S. 209 at 219 reaffirmed *Brady*, at 87, holding that the "touchstone of due process analysis is the fairness of the trial, not the culpability of the prosecutor."

In addition, the police clerical error led directly to witness Dawkins' ability to perjure himself on three occasions and deny that he had any prior criminal convictions. The Third Circuit found that he had committed perjury three times when he denied his past criminal history. *See Hollman v. Wilson*, *supra*, at note 8. (App. 10a).

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3. *Kyles* was decided on April 19, 1995, prior to the Superior Court ruling on petitioner's appeal (May 17, 1995) and petitioner is therefore entitled to rely on it to show that his state court ruling "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d).

Without this host of impeachment evidence, Dawkins was able to valorize himself in the eyes of the jury and become the witness on whom the prosecutor relied most heavily in his summation. There was other evidence introduced against Petitioner that will be fully described below.

The trial court and the Superior Court of Pennsylvania ruled that Dawkins' undisclosed record of ten prior convictions did not constitute *Brady* material. Instead the ten convictions were treated as after discovered evidence and both courts held that had defense counsel been able to impeach Dawkins with these convictions an acquittal would not have resulted.

Reargument was sought in the Superior Court and denied on May 17, 1995.

The Supreme Court of Pennsylvania denied Allocatur which is their certiorari jurisdiction on April 1, 1996.

The instant habeas petition was filed on March 24, 1997 and is subject to the AEDPA.

The denial of habeas relief was affirmed by the Third Circuit which found that the ten convictions were *Brady* material as impeaching material has always been *Brady* material. However the Third Circuit held that *Brady* was not implicated on these facts because it could not ascribe any fault to the prosecutor for not having the ten convictions because of the clerical error. *Hollman v. Wilson*, 158 F.3d 177, n.3 (3d Cir. 1998) (App. 6a) (. . . we, too, find that *Brady* is not implicated.")

The Third Circuit alternatively reasoned that even if considered *Brady* material, the result of the trial would not have been different had it been disclosed. *See Hollman v. Wilson*, 158 F.3d 177, at __ (3d Cir. 1998) (App. 8a, 11a).

In so holding the Third Circuit rejected Petitioner's argument that any trial where the verdict could rest in whole or in part on testimony bolstered by perjury, is a trial in which the requisite confidence demanded by *Kyles v. Whitely*, 514 U.S. 419 at 434, 131 L. Ed. 2d 490 at 506, 115 S. Ct. 1555 at 1566 (1995) cannot be placed. *Kyles* also emphasized that the applicable test on review involves far more than the sufficiency analysis which comforted the Third Circuit. *Kyles*, at 435, n.8.[4]

The Third Circuit held that Dawkins' perjury did not give rise to separate rights under *Brady*. But Petitioner never argued that the thrice repeated perjury that bolstered Dawkins' testimony and valorized him created separate rights under *Brady*. Petitioner did argue that the repeated perjury and the heavy reliance by the prosecutor on Dawkins' testimony which had been bolstered by his perjury is a factor, indeed a major factor, in evaluating the trial under the *Kyles* standard — whether or not this is a trial that resulted in a verdict in which confidence can be placed or whether confidence in the verdict has been undermined. On this *Kyles*, *supra*, at 434 is very clear:

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4. Petitioner has never argued that the evidence was not sufficient to support a conviction. His defense was a reasonable doubt defense that would have been aided greatly by the use of Dawkins' ten prior convictions and the elimination of Dawkins' passing himself off as a good citizen who happened to see a crime when in fact he was a career criminal. The Commonwealth in its effort to show "overwhelming evidence" when such evidence is decidedly lacking has taken liberties with the record, arguing that Petitioner possessed a firearm that could well be the murder weapon when in fact the Petitioner was arrested within 5 to 10 minutes of the slaying and thereafter told police that his .38 which he was licensed to have because of his security job was in his apartment. Police went to his apartment and secured the .38 which was exactly where Petitioner said it would be. Ballistics could not link this weapon to the crime although a .38 caliber bullet did cause the fatal injury. To the Commonwealth the fact that Petitioner has a .38 in his residence was probative. In fact it is not.

> The question is not whether the defendant would more likely have than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial."

To Petitioner the *Brady* violation when coupled with the three instances of perjury clearly undermined confidence in the verdict because the verdict could rest in whole or in part on Dawkins testimony — testimony fortified and bolstered by his perjury.

The reasons the Third Circuit provided for affirming are erroneous and dilute the values protected by *Brady* and *Kyles*.

STATEMENT OF FACTS

The Commonwealth presented Andre Dawkins as an alleged eye-witness who identified Petitioner as an accomplice involved in the robbery murder who assisted in the robbery but who did not shoot the deceased.

Other evidence came from Deidre Jones who alleged that she was the lookout who overheard cursory planning of the robbery while she was a passenger in a van that contained four persons, one of whom was petitioner, and the other two persons being unknown to her. Deidre Jones was an accomplice who bargained for complete immunity from prosecution for this murder in exchange for her testimony.

The prosecution also attempted to link Petitioner to the van involved in the shooting which was seen fleeing the crime's location by a cab driver who recorded its initial license plate numbers (YZA). Although Petitioner was arrested while driving a van rented from Alamo whose tag bore those first three letters, this testimony was weakened by the fact that subsequent testimony established that there were three other such vans leased from the Alamo agency that also bore the initial letters of YZA on their tags. One of those three was leased to a Denise Combs, and Dawkins had identified her photograph as being in the van involved, further weakening the link the Commonwealth tried to forge between Petitioner and the van he drove with the initial license tag letters YZA.

One other such van then on Philadelphia roads had been rented by the Alamo agency to a Denise Combs, and remarkably, Dawkins identified her as one of the females he saw in the van involved. The odds of Dawkins identifying a female who had rented a van with the initial license tag letters YZA are astronomical. The van in which Petitioner was arrested also bearing the initial license tag letters YZA had no rental connection with Denise Combs.

Finally, a police detective testified that Petitioner stated, "I told the bitch to keep her mouth shut, shit." (N.T. 4/27/93 at 1467-1474) when he was shown Deidre Jones' inculpatory statement during interrogation. Prior to being shown this statement, Petitioner had repeatedly denied any role in the robbery murder.

Post trial motions centered on the fact that a clerical error by the Philadelphia police identification unit led to trial counsel's specific request for eye witness Andre Dawkins' criminal record being met with his being provided a "clean" criminal record history which revealed no felony or

misdemeanor convictions but did reveal his arrest for burglary which occurred three days prior to his trial testimony. In truth and fact Dawkins had a lengthy criminal record of ten (10) convictions all of which were admissible to show bias and to impeach his credibility. One conviction was for making False Reports to Authorities Incriminating Another.[5]

It was conceded that the Identification Unit negligently gave Dawkins a new photo number when he was arrested three days prior to his trial testimony when in fact his fingerprints should have been calibrated to his old photo number which would have revealed his entire record of 10 prior convictions.

These convictions were admissible under Pennsylvania law to impeach Dawkins and to show bias. Dawkins not only bolstered his testimony by falsely claiming to have no record of misdemeanor or felony convictions (only summary convictions) but valorized himself and allowed the prosecutor to valorize him in turn by virtue of his perjury. Instead of the good citizen who happened upon a criminal event as he portrayed himself and was portrayed by the prosecutor, Dawkins was a career criminal who well knew the value of being a critical witness in a murder case to police and to prosecutors.

There is no question that his denials of having any convictions for misdemeanors or felonies was perjured testimony and the Third Circuit so found. *Hollman*, *supra*, n.8.

During trial when trial counsel specifically asked for Dawkins' prior criminal record, he was given a police sheet containing the open burglary arrest made three days previous with no record of prior felony or misdemeanor convictions thereon.

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5. The other convictions were for three counts of robbery, three counts of conspiracy, theft, criminal trespass and defiant trespass.

Petitioner alleged that this comprised a *Brady* violation. Instead of severely impeach Dawkins with his past criminal career, defense counsel had no way of countering Dawkins perjured assertions — made three times — that he had no record at all of convictions for felonies or misdemeanors. The *Brady* violation led to the defense being unable to impeach Dawkins with his career criminal status, and instead, his perjury allowed Dawkins to bolster and fortify his testimony.

Petitioner submitted that the prosecutor used Dawkins as the central witness against him, concluding his summation with a plea to the jury to believe Dawkins.

The prosecutor who was closest to this case and who knew and felt its necessities — chose to rely in his summation on Dawkins as an unshaken witness in imploring the jury to convict in the final moments of his summation.

> I say to you, you have enough. I say to you, do your duty. I say to you, in the examination of Andre Dawkins, *was he shaken*? And do you think less of Andre Dawkins because of what a detective said that had nothing to do with nothing. . . . (N.T. 5/3/93 pgs. 1689-1690) (Emphasis supplied).

Not only did the prosecutor rely heavily on Dawkins, but the charge of the court invited the jury to use Dawkins testimony to shore up or corroborate the accomplice testimony of Deidre Jones. The Court gave the standard accomplice charge as to accomplice witness Deidre Jones, informing the jury that her testimony came from a "corrupt and polluted source" and should be viewed with disfavor as accomplices "will often try to place the blame falsely on someone else, and may testify falsely in the hope of obtaining favorable treatment or some other corrupt or wicked motive." (N.T. 5/3/93 pgs. 1732, 1733).

The Court instructed the jury that "Accomplice testimony is more dependable if supported by independent evidence," *Id.* 1733, inviting the jury to utilize the eyewitness testimony of Andre Dawkins to shore up what was obviously weak accomplice testimony in view of the initial denial and the "deal" Ms. Jones had — complete freedom in exchange for the implication of Petitioner. This invited the jury to use the "unshaken" Dawkins testimony to bolster and support the accomplice testimony of Deidre Jones.

And the court emphasized single witness testimony in its charge. (N.T. 5/3/93 pg. 1735, 1731-32 — "However you should recognize that it is entirely possible for a single witness to give truthful and accurate testimony and that person's testimony may be believed even though a greater number of witnesses of apparently equal reliability may have contradicted that witness.").

Thus, Petitioner's jury was asked by the prosecutor to rely on Dawkins' testimony, was invited by the trial court to use Dawkins' testimony to shore up Deidre Jones' testimony, and was also invited to convict based on the testimony of a single witness.

Petitioner was convicted of second degree murder and sentenced to life in prison.

Pennsylvania's position throughout this case has been far too tolerant of perjury — perjury which clearly caused it to be the beneficiary of police negligence. Pennsylvania succeeded in placing the risk of such police negligence and the perjury of its own witness on the accused. The Third Circuit held that *Brady* is not implicated by these facts, excused the failure to comply with basic *Brady* obligations because of the negligence of the police, overlooked the fact that Petitioner's verdict may

well rest in whole or in part on the testimony of Andre Dawkins. This was testimony that should have been impeached to the point that it would have been discarded by the jury but instead was bolstered and fortified by Dawkins' perjury. In other words because of the police negligence in "losing" the *Brady* material which was in the form of Dawkins' ten prior convictions and because of his perjury that was made possible by such negligence Pennsylvania's case was made much stronger and the reasonable doubt defense offered made much weaker than the full facts warranted.

To Pennsylvania, this is a verdict in which the confidence required by this Court in *Kyles* can be placed.

Petitioner disagrees. Further review is absolutely required.

REASONS FOR GRANTING THE WRIT

One of the most cherished of all due process rights is the obligation of the prosecutor to disclose evidence favorable to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963) — whether it be exculpatory or impeaching.

Without this obligation, confidence in verdicts would be greatly reduced as it provides a basis in fact for our hopes that verdicts are based on the truth.

The respect paid to this obligation by the courts is directly proportionate to its efficacy. When negligence is granted the status of a full defense to the failure to fulfill the *Brady* obligation, our faith that verdicts are based on truth is shaken to the core.

When *Brady* material is not turned over to the defense, the impact on the accused is identical whether the motives of the prosecutor are good or bad.

The point of having an obligation is that it is imposed on all, and escaped by none. The *Brady* obligation is a constant obligation — to be met in all cases, whether or not there is prosecutorial misconduct, fault, outright deceit or negligence. Diluting the obligation by allowing negligence or mistake to excuse it is totally unacceptable.

The Third Circuit by virtue of its published opinion in this case has undermined the *Brady* obligation, converted that obligation into one dependent on police or prosecutorial misconduct, and allowed a negligence defense to the failure to provide the defense with material impeaching evidence to excuse such failure.

No one in this case doubts that an honest mistake was made with Dawkins' criminal record. The point of *Brady* is that such mistakes must take a toll on the prosecution, not the defense.

Of the two parties involved — prosecution and defense — one has to bear the risk of negligence by police or prosecutor that results in the failure to turn over critical evidence.

The Third Circuit has placed that burden squarely on the accused, and has allowed the prosecution to be the windfall beneficiary of its own negligence. Something is surely wrong with this picture.

Additionally, perjury exacerbated the *Brady* violation caused by the negligence of the police identification unit. On three occasions the witness to whom the *Brady* material related denied that he had any criminal record of convictions for misdemeanors or felonies when in fact he had ten (10), one of which was for Falsely Incriminating Another.

While there was other evidence in the case, and it is true that the jury could have convicted as the Third Circuit found

without relying at all on Dawkins' testimony, this manner of analysis has been constantly rejected by this Court. Sufficiency of the evidence is not the touchstone. *Kyles*, *supra*, 514 U.S. 434.

Review by this Court is required to reassert the primacy of the *Brady* obligation.

This Court in *Kyles v. Whitely*, *supra*, 514 U.S. 437-438 made it clear that information known to the police but not communicated to the prosecutors is nonetheless subject to the *Brady* requirement of disclosure to the defense. Here, Dawkins' past criminal record should have been known to police and would have been known to police had the negligence been avoided. Even so, these were Philadelphia convictions secured by Philadelphia prosecutors and it would not be unfair to hold the prosecutor's office to constructive knowledge of such convictions.

The Third Circuit held that because of the administrative mistake or negligence, *Brady* was not implicated and that it "cannot conclude that the government withheld information that was readily available to it or constructively in its possession." (App. at 8a).

A defendant is entitled to a fair trial — and the *Brady* obligations are most important in assuring a fair trial. The Third Circuit ruled that a defendant is entitled to a fair trial unless there is police negligence and then if there is such negligence which involves *Brady* material (even if aggravated by the perjury of the witness involved) if the evidence is otherwise sufficient, no relief can be secured.

This is hardly protecting and preserving this Court's long established precedent in the *Brady* area.

Kyles requires that a court review a case where *Brady* information is not furnished the defense in terms of whether or not there is a reasonable probability that the result would have been different, and such a reasonable probability is shown when "the Government's evidentiary suppression 'undermines confidence in the outcome of the trial.' " *Kyles* at 514 U.S. at 434.

While the Third Circuit gave lip service to this standard, it overlooked the perjured testimony — three instances thereof — in its determination of whether or not this verdict can be viewed with confidence.

Petitioner submits that in view of the fact that Dawkins was so heavily relied upon by the prosecutor in his summation and the charge of the court invited the jury to utilize his testimony in several ways, all of which were highly prejudicial to Petitioner, a reviewing court cannot be certain that the verdict returned did not rest in whole or in part on his perjury — perjury made possible by the *Brady* violation.

Where perjury resulting from a Brady violation can be so instrumental in a conviction (and the evidence not turned over shows the witness to be a career criminal and not the good citizen he passed himself off as being) no confidence can be placed in the resulting verdicts.

The Third Circuit's published opinion refused to find a *Brady* violation where one should have been found, and then refused to apply the *Kyles* test in evaluating the Brady violation. In so doing, the Third Circuit seriously diluted the Brady obligations of all prosecutors, made negligence a complete defense to a Brady violation, replaced the explicit language of Brady which did not place *Brady* no a fault basis with a prosecutorial misconduct standard. This Court must grant further review.

CONCLUSION

For the reasons delineated above, it is respectfully submitted that this Court should grant the Writ of Certiorari herein sought.

Respectfully submitted,

NORRIS E. GELMAN
Attorney for Petitioner
The Public Ledger Building
620 Chestnut Street
Suite 940
Philadelphia, Pennsylvania 19106
(215) 574-0513

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED SEPTEMBER 11, 1998

Filed September 11, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-2062

CHESTER HOLLMAN,
Appellant

v.

HARRY E. WILSON, SUPERINTENDENT, RETREAT; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 97-cv-2115)

Argued June 9, 1998

Before: STAPLETON, COWEN, and RENDELL,
Circuit Judges

(Filed: September 11, 1998)

NORRIS E. GELMAN [ARGUED]
The Public Ledger Bldg.
6th & Chestnut Streets
Philadelphia, PA 19106

Counsel for Appellant

Appendix A

DONNA G. ZUCKER [ARGUED]
Office of the District Attorney
1421 Arch Street
Philadelphia, PA 19102-1582

Counsel for Appellees

OPINION OF THE COURT

RENDELL, Circuit Judge.

Appellant, Chester Hollman, appeals from the district court's denial of his habeas petition filed pursuant to 28 U.S.C. § 2254, claiming that a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), undermines his murder conviction. For the reasons discussed below, we will affirm.

Factual Background

On May 4, 1993, a Common Pleas Court jury in Philadelphia convicted Hollman of second-degree murder, possession of an instrument of crime, robbery, and criminal conspiracy for his involvement in the shooting death of Tae Jung Ho, a graduate student at the University of Pennsylvania. Ho had been walking with his girlfriend at 22nd and Sansom Streets in Philadelphia in the early morning of August 20, 1991, when the two were approached by Hollman and another man, who pushed Ho to the ground. Hollman restrained Ho by sitting on his legs while the other assailant shot Ho in the chest; he was killed instantly. Hollman then robbed Ho and the two men ran back to their vehicle, a white Chevy Blazer.

The evidence against Hollman included the testimony of Deirdre Jones who had been traveling with Hollman in the car that night. She testified that she had been driving around Center City with Hollman and two other individuals, a man and a woman. The two men stopped the car and discussed their plan to rob someone; Jones was instructed to act as a "lookout." The two men then left the car. Jones heard a gunshot and the two men jumped back into the vehicle and sped away. Shortly thereafter, the two

other passengers exited the car and Hollman and Jones continued driving.

Two other witnesses near the scene testified that they heard a gunshot and saw two men jumping into a white Chevy Blazer which contained two passengers. One witness, a taxi driver, followed the car and was able to read the first few letters of the license plate, "YZA" before losing the car in traffic. The driver reported what he had seen and gave a description of the vehicle. Shortly thereafter, a Philadelphia police officer stopped the car driven by Hollman within blocks of the crime scene. It matched the taxi driver's description and bore a license plate which started with the letters "YZA." As the officer questioned and searched Hollman he observed that Hollman was perspiring heavily and seemed highly agitated.

At trial, the only eyewitness who claimed to have actually seen the crime in progress was Andre Dawkins. Dawkins was standing outside a convenience store across the street from the crime scene. He testified that he saw Hollman and another man push Ho to the ground and heard Ho plead for his life and the life of his girlfriend. Dawkins claimed to have had a good view of Hollman running back to the car after the shooting and identified Hollman as the man who had restrained Ho while the other assailant shot him.

During his interview with the police, Hollman denied everything. However, when confronted with the statement of Deirdre Jones, he blurted out, "I told that bitch to keep her mouth shut, shit." During a search of Hollman's residence, a .38 caliber revolver was discovered. An expert testified at trial that the bullet that killed Ho could have come from that gun.

The jury convicted Hollman of second degree murder, possession of an instrument of crime, robbery, and criminal conspiracy.

After the trial, Hollman's counsel learned that, due to an apparent clerical error, the prosecution had not had, and thus did not provide him with, a full and accurate report of Dawkins's criminal history. This error was not detected until Dawkins was arrested for robbery several months after the Hollman trial. Dawkins had accidently been given

two different identification numbers in the police computer system. The record retrieved by the government and provided to defense counsel contained a recent arrest for burglary, a prior arrest under the alias John Johnson, and several open bench warrants. However, it did not contain significant aspects of Dawkins's criminal history including robbery and conspiracy convictions, and a prior conviction for filing a false report of incriminating evidence with the authorities.

Hollman moved for a new trial in state court arguing, *inter alia*, that the prosecution's failure to turn over this impeachment evidence constituted a *Brady* violation. *See Brady v. Maryland*, 373 U.S. 83 (1963).[1] Hollman contended that had the information been available during trial, the credibility of Dawkins could have been impeached using his prior crimen falsi convictions. The trial court held a post-trial hearing on the matter and then denied the motion, sentencing Hollman to life in prison. The Superior Court rejected the same argument and the Supreme Court of Pennsylvania denied an allowance of appeal. Hollman then filed this § 2254 motion in the district court on March 2, 1997. The district court, adopting the opinion of the Magistrate Judge, denied relief finding that the failure to produce Dawkins's entire criminal record did not warrant a new trial under *Brady*. As the district court granted a certificate of appealability, we have jurisdiction pursuant to 28 U.S.C. § 2253(a). We likewise deny Hollman's habeas petition.

Standard of Review

We exercise plenary review over a district court's legal conclusions made in reviewing a § 2254 petition. *See Orban v. Vaughn*, 123 F.3d 727, 729 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 717 (1998). Because Hollman filed his petition before the district court on March 24, 1997, it is governed by the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") which became effective on April 24, 1996. The AEDPA creates the following standard that

1. Hollman raised other issues in his state court motions but the appeal before us focuses on the alleged *Brady* violation.

federal courts must apply when reviewing a habeas petition brought by a state prisoner:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The issue raised in Hollman's habeas petition was clearly adjudicated on the merits in state court. Because the question before us is one of law we examine the state court's decision to determine if it was "contrary to, or involved an unreasonable application of clearly established federal law." As we find that the state court's decision on Hollman's petition was not deficient under this standard, we will deny habeas relief.

We recognize that we have not yet defined the contours of the new AEDPA standard. *See Berryman v. Morton*, 100 F.3d 1089, 1103 (3d Cir. 1996) (stating that "we have not determined the extent of the deference that federal habeas courts must afford to the legal or the factual determinations made by state courts").[2] However, we need not do so here, because the Pennsylvania Superior Court did not render a decision contrary to clearly established federal law under any reading of the relevant standard.

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2. *Cf. O'Brien v. DuBois*, 145 F.3d 16 (1st Cir. 1998) (setting forth that circuit's interpretation of the AEDPA); *Green v. French*, 143 F.3d 865 (4th Cir. 1998) (same); *Neelley v. Nagle*, 138 F.3d 917 (11th Cir. 1998) (same); *Drinkard v. Johnson*, 97 F.3d 751 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1114 (1997) (same).

Appendix A

State Court's Determination

When the error regarding Dawkins's criminal identification numbers was discovered, Hollman moved for a new trial on the basis of the claimed *Brady* violation and argued that his counsel had been ineffective in failing to produce other evidence to impeach Dawkins. The trial court conducted a post-trial hearing. The court determined that the failure to produce Dawkins's entire criminal record did not constitute a *Brady* violation and that even if defense counsel had known about the earlier convictions, the result of the trial would not have been different. The trial court thus concluded that a new trial was not warranted. Hollman appealed to the Superior Court which determined that the mistakenly omitted evidence did not constitute a *Brady* violation, that Hollman was not entitled to a new trial on the basis of after-discovered evidence, and that the court's charge did not deny Hollman due process.[3] The Supreme Court of Pennsylvania denied an allowance of appeal on April 1, 1996. As Hollman has exhausted his state court remedies with respect to the issues raised in this appeal, we can review his claim brought under § 2254.

Discussion

In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." 373 U.S. at 87. A new trial will be granted for a *Brady* violation only if the defendant can demonstrate both that the prosecution withheld exculpatory evidence, and that the evidence was material, in that the defendant did not receive a fair trial because of its absence. *See United States v. Pelullo*, 105 F.3d 117, 122 (3d Cir. 1997). It is well established that

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3. Although the Superior Court decision that *Brady* was not violated rested on an erroneous view that impeachment material cannot constitute exculpatory evidence under *Brady*, the particulars of the reasoning do not affect our ruling because we hold that, in any event, the state court adjudication did not result in a decision that was contrary to, or an unreasonable application of, clearly established federal law because we, too, find that *Brady* is not implicated.

impeachment evidence can constitute exculpatory evidence under *Brady* and its progeny and Hollman is correct that evidence of a government witness's prior criminal history is evidence which must be produced to the defense. *See United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150, 153 (1972).

The law is clear that the prosecution must not "withhold" impeachment evidence. It is equally clear that the government is only "obligated to produce certain evidence actually or constructively in its possession or accessible to it." *United States v. Perdomo*, 929 F.2d 967, 970 (3d Cir. 1991).[4] Where the prosecutor had no actual or constructive possession of information, there can be no *Brady* violation for failure to disclose it. It is uncontested that the prosecution did not have actual possession of the full criminal record of Dawkins. Constructive possession means that a prosecutor "should . . . have known that the material at issue was in existence." *United States v. Joseph*, 996 F.2d 36, 39 (3d Cir. 1993).

In *Perdomo*, we found a *Brady* violation where the government failed to provide the defense with a witness's criminal history report. 929 F.2d at 971. In that case, however, the government's search for available information was deficient in that it failed even to request a criminal history report from the Virgin Islands. *Id.* It was the government's failure to seek "information readily available to it" which prompted the court to find that the first prong of *Brady* had been violated. *Id.* Thus, we, along with several other circuits have imposed upon the prosecution a duty to search accessible files to find requested exculpatory material. *See United States v. Brooks*, 966 F.2d 1500, 1502-03 (D.C. Cir. 1992); *Carey v. Duckworth*, 738 F.2d 875, 878

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4. By discussing Third Circuit caselaw construing *Brady* we are not concluding that it is necessarily pertinent, let alone controlling, in applying the standard under the AEDPA. There are conflicting views among the courts of appeals referenced above as to the relevance and weight of precedents established by courts other than the Supreme Court in applying the AEDPA, and we have yet to explore this issue. However, *Perdomo* is useful to demonstrate that even our court of appeals, in applying *Brady*, has not ventured from the concept that it is available and accessible information that must be disclosed.

(7th Cir. 1984); *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980). As one court has noted, the duty rests on the notion that "government failure to turn over an easily turned rock is essentially as offensive as one based on government non-disclosure." *Brooks*, 966 F.2d at 1503. The duty to search discourages the government from intentionally keeping itself ignorant of information useful to the defense. *See Carey*, 738 F.2d at 878. However, where the government has diligently searched, no *Brady* violation will be found. *See United States v. Young*, 20 F.3d 758, 764 (7th Cir. 1994) (declining to find *Brady* violation where government diligently searched national and local files for information about witness's criminal history but failed to search records of other states).

Here we cannot say that the prosecutor should have — or even could have — known about, or searched for, the clerical error which resulted in Andre Dawkins being given two different criminal identification numbers. The cause of the failure is characterized by the parties as an administrative mistake. Without some record evidence that it was something more than a mistake, we cannot conclude that the government withheld information that was readily available to it or constructively in its possession. Accordingly, we find that the government did not withhold Dawkins's full criminal history and that the failure of the government to produce this material does not constitute a *Brady* violation.

We note that Hollman is really arguing that we expand the scope of what constitutes *Brady* material, since he does not dwell on the issue of accessibility, but focuses, rather, on his view that the defendants' proceeding to trial without this type of information simply *should* constitute a violation of *Brady*. We have little difficulty rejecting this argument as it clearly entails extending *Brady* beyond the scope of any federal case precedent.

Even if we were to view the prosecution's failure to retrieve Dawkins's complete record as a violation of *Brady*, he would not be entitled to a new trial unless we determined that the favorable evidence was "material" in that Hollman did not receive a fair trial because of the absence of that evidence. *See Pelullo*, 105 F.3d at 122

(citations omitted). A fair trial is one deemed worthy of confidence. *See Kyles v. Whitley*, 514 U.S. 419, 434 (1995). The defendant must show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435. The question here is whether Dawkins's crimen falsi convictions are material, that is, whether there is a reasonable probability that disclosure of his criminal record would have led to a different result at trial. *Id.* at 432-42.

Hollman asserts that the absence of a record of Dawkins's prior crimen falsi convictions was material and deprived him of a fair trial in three ways. First, Dawkins was able to perjure himself with impunity regarding his criminal history; second, the government relied on Dawkins's credibility in its closing; and third, the jury instructions given by the trial judge somehow buttressed the credibility of Dawkins's testimony. Like the district court, we disagree.

It should be noted at the outset that Dawkins's credibility was impeached repeatedly during the trial. The cross-examination of Dawkins focused on inconsistencies in his statements to the police and in his trial testimony.[5] During his cross-examination, defense counsel established that Dawkins had an extensive history of conflict with law enforcement which he blamed on police harassment. The jury was made aware of the fact that Dawkins had a criminal record.[6] In addition, Dawkins admitted that bench

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5. Dawkins admitted that when questioned by the police he had initially denied seeing the murder and lied in his statement to the police because he "didn't want to get involved." App. at 1359-62. He also admitted that he did not reveal his address to police officers but claimed to be living on the streets because he feared he would be considered a "snitch" for reporting what he saw. App. at 1337.

6. Defense counsel questioned Dawkins about his most recent burglary arrest, about his prior conviction for theft and on his use of an alias in connection with that arrest. He denied his involvement in the burglary and his use of an alias but admitted, "I have summaries. I have a burglary. I ain't been a saint all of my life." App. at 1267.

warrants had been issued for him in several "summary cases." App. at 1255.[7]

When Dawkins was questioned about his most recent arrest for burglary, he denied that he had committed the crime and complained of extensive harassment by the police. However, the arresting officer testified that at the time of his arrest Dawkins admitted to having committed the burglary and that he was able to describe the items removed from the apartment. App. at 1557-58. In addition, the detective told the jury that Dawkins asked for help in dealing with his crack cocaine addiction. App. at 1559. During his testimony, Dawkins had stated that he hadn't used drugs for years. App. at 1286.

Further, Dawkins admitted at trial that he had a history of mental problems. Specifically, Dawkins testified that he had spent seven months in a state mental institution because he "didn't know who [he] was." App. at 1285. He also stated that he was no longer taking his psychiatric medication and had not been taking the medication at the time he observed Ho's murder. App. at 1286. We conclude that the additional impeachment material contained in the complete criminal record would have been merely cumulative. We find that even had defense counsel been provided with Dawkins's crimen falsi convictions, the additional impeachment evidence would not have put the whole case in such a different light as to undermine our confidence in the verdict.

Hollman contends that the harm created by the purported *Brady* violation was exacerbated because Dawkins escaped challenge for his perjury on the stand.[8] It

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7. In response to a question about outstanding bench warrants Dawkins replied,

> I had summary bench warrants. It's from the case I got a little — it used to haunt me. I used to dream about it so much that I had an attitude constantly, so much of an attitude that if someone said something to me, I would tell them off. They would not leave me alone. They still don't leave me alone. . . . And I told off many a police officer, many a people, and they locked me up.

App. at 1255-56.

8. This perjury consisted of three instances where Dawkins denied having a criminal record. App. at 1267; 1268; 1272.

is true that Dawkins perjured himself by not revealing that he did have a criminal record but this does not give rise to separate rights under *Brady*. Further, we note that had all the parties had Dawkins's full criminal history, it is unlikely that he would have testified that he had no record. Rather, it appears that Dawkins was attempting to benefit from the clerical error which seemingly purged a portion of his criminal past.

Hollman's contention that the government, in its closing argument, relied on the credibility of Dawkins is similarly flawed. App. at 1686; 1689-90.[9] To the contrary, the prosecutor did not place undue reliance on the credibility of Dawkins and, seemingly realizing his questionable credibility, advised the jury that there was sufficient evidence to convict Hollman without the testimony of Dawkins. App. at 1679. Finally, Hollman's argument that the jury instructions invited the jury to rely on the testimony of Dawkins is without merit. The trial judge gave standard jury instructions that would have been unaffected if Dawkins had been impeached using his crimen falsi convictions.

The record as a whole lends further support to the conclusion that there was sufficient evidence to convict Hollman without the testimony of Dawkins. Compelling evidence was provided by Deirdre Jones who was traveling in the car with Hollman that night. While the trial court properly instructed that her testimony was subject to scrutiny as a "corrupt and polluted source," her version of the events was corroborated by the other witnesses in the case. For example, two witnesses heard the shooting, saw two men fleeing, and supplied information about the white

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9. In the two passages cited by Hollman, the prosecutor asked the jury to decide if Dawkins was "shaken" on the stand. However, the passages, read in their entirety reveal that the prosecutor recognized that his witness was flawed. First, the prosecutor stated: "No, I won't apologize for Andre Dawkins because there's dignity in everything. I submit to you that you saw him on the stand. Was he articulate? Was he shaken on cross-examination?" App. at 1686. Later, he asked, "I say to you, in the examination of Andre Dawkins, was he shaken? And do you think less of Andre Dawkins because of what a detective said that had nothing to do with nothing? If so, it's your decision." App. at 1690.

vehicle. One was able to note that the license plate started with "YZA." Shortly after the crime, and within blocks of the crime scene, a police officer stopped Hollman driving a vehicle matching this description. The officer testified as to Hollman's anxious demeanor upon being searched. Upon being informed that Jones had provided a statement, Hollman exclaimed, "I told that bitch to keep her mouth shut, shit." Finally, the bullet which killed Ho came from a .38 caliber gun. A .38 caliber gun was found in Hollman's apartment.

Thus, we conclude that the Superior Court's decision that the failure of the government to provide the full criminal history of Andre Dawkins did not constitute a violation of Hollman's rights under *Brady* was not a decision that was contrary to or an unreasonable application of federal law.

For the foregoing reasons, we will affirm the district court's order of November 25, 1997, denying Hollman's petition for habeas corpus.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ENTERED NOVEMBER 24, 1997 AND FILED NOVEMBER 25, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No.
97-2115

CHESTER HOLLMAN

v.

HARRY E. WILSON, et al.

AND NOW, this 24 day of November, 1997, upon consideration of the Report and Recommendation of Magistrate Judge Thomas J. Reuter, the petitioner's objections thereto, and respondent's response, it is ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED;

2. The petition for writ of habeas corpus is DENIED; and

3. A certificate of appealability is GRANTED.

November 24, 1997

s/ Louis H. Pollak
Pollak, J.

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ENTERED AND FILED NOVEMBER 4, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 97-2115

CHESTER HOLLMAN

v.

HARRY E. WILSON, et al.

REPORT AND RECOMMENDATION

THOMAS J. RUETER
United States Magistrate Judge

November 4, 1997

Petitioner, Chester Hollman, has filed a counseled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is presently incarcerated in the State Correctional Institution at Hunlock Creek, Pennsylvania. For the following reasons, this court recommends that the court deny the petition.

I. *BACKGROUND*

On May 4, 1993, a jury convicted petitioner of second-degree murder, possession of an instrument of crime, robbery, and criminal conspiracy in the Court of Common Pleas of Philadelphia. (Nos. 3313, 3314, 3316, and 3319, Sept. Term, 1991.) On July 19, 1994, after denying post-trial motions, the

trial judge sentenced the petitioner to life imprisonment. The prosecution proved that on August 20, 1991, the petitioner and an accomplice robbed Tae Jung Ho, a University of Pennsylvania student, and shot and killed him. At trial, the prosecution presented the following evidence.

At about 1:00 a.m. on August 20, 1991, Tae Jung Ho, then twenty-four years old, and his girlfriend, Junko Nihei, were both students; Ho was studying at the University of Pennsylvania and Nihei was enrolled at the Pennsylvania Ballet School. (N.T. 4/27/93 at 1171.) While the students were walking toward Ho's apartment, they were approached by petitioner and another man, who pushed Ho to the ground. The petitioner then sat on Ho's legs and restrained him so he could not move. At the same time, petitioner's accomplice shot Ho in the chest at point blank range. (N.T. 4/29/93 at 1415, 1424.) Ho was killed instantly. After going through the victim's pockets, the two murderers ran back to their car, which witnesses described as being a white van-type vehicle. (N.T. 4/28/93 at 1243-51.)

One of the witnesses the Commonwealth called at trial was Deirdre Jones, who was a passenger in the getaway car that night. She stated that on the night of the murder, she and the petitioner, plus another man and woman, drove around Center City Philadelphia in a white van-type vehicle. She related that at one point in the evening, the petitioner and the other man left the van after stating their intention to rob someone. While petitioner and the other man were out of the van, Jones heard a gunshot. The petitioner and the other man quickly jumped back into the car, and sped away from the scene. Within a few blocks, the van stopped and the unidentified man and woman exited the vehicle. Petitioner and Jones stayed in the van and drove away. (N.T. 4/26/93 at 996-1016.)

Appendix C

Other eyewitnesses testified at trial. A taxi cab driver, John Henderson, heard the gunfire and saw two men fleeing from the scene of the crime into a white van. He saw two other persons in the van. Henderson pursued the vehicle and managed to read the first three letters of the license plate, "YZA", before losing the van in traffic. (N.T. 4/26/93 at 922-48.) After receiving Henderson's description of the getaway vehicle, a Philadelphia police officer stopped the van. The officer ordered the petitioner and Jones to get out of the van, and proceeded to search them for weapons. The police officer noticed that petitioner was perspiring heavily, his heart was beating quickly, and he seemed highly agitated. (N.T. 4/26/93 at 956-65.)

Another eyewitness, Salvatore Genestra, heard gunfire and saw Nihei screaming. He also saw one man run into the waiting white Chevrolet Blazer, which then sped away. He noticed that there were four passengers in the van, confirming the testimony of Deirdre Jones. (N.T. 4/27/93 at 1201-06.)

Andre Dawkins also testified that he was standing on the street on the night in question and witnessed the entire crime. Specifically, he saw the petitioner and the other man push Ho to the ground. Dawkins heard Ho plead for his life and for the life of his girlfriend. He saw the flashing light as the gun was fired and had a good view of petitioner's face as petitioner stood up and ran to the van. Dawkins positively identified the petitioner at trial as the person who held down the victim as his accomplice shot the gun. (N.T. 4/28/93 at 1241-1368.)

When the police interviewed the petitioner at the police station, at first, he denied everything. However, when confronted with Deirdre Jones' statement, he said he would not say anything more, but he exclaimed, "I told that bitch to

keep her mouth shut, shit." (N.T. 4/27/93 at 1113.) Later, the police executed a search warrant at petitioner's residence, and found therein a Smith & Wesson .38 caliber revolver. A firearms expert testified at trial that the bullet that killed Ho was also a .38 caliber and could have been fired from that gun. (N.T. 4/29/93 at 1467-74.)

Petitioner appealed to the Superior Court of Pennsylvania and raised two claims: (1) that the prosecution's failure to provide the defense with an accurate criminal record for eyewitness Andre Dawkins violated the disclosure requirement of *Brady v. Maryland*, 373 U.S. 83 (1963); and (2) the absence of Dawkins' prior criminal record denied petitioner due process of law because it was material to a full understanding of the court's charge. The Superior Court affirmed the judgment of sentence in a memorandum opinion dated May 17, 1995. The Supreme Court of Pennsylvania denied allowance of appeal on April 1, 1996. *Commonwealth v. Hollman*, No. 616, E.D. Allocatur Docket 1995.

On March 24, 1997, petitioner filed this habeas corpus petition, asserting the identical claims raised before the Superior Court. The Commonwealth concedes that the petitioner had exhausted his state court remedies, as required by 28 U.S.C. § 2254(b). Thus, this court can review the petitioner's claims.

II. *DISCUSSION*

The petitioner does not dispute the reasons advanced by the Commonwealth for the failure to disclose Andre Dawkins' complete criminal history. Due to a clerical error in the police department, at the time of trial, the District Attorney did not know that Dawkins had two different identification numbers

in the police computer system. Because of this mixup, the prosecutor supplied defense counsel with an incomplete criminal history for Dawkins. While defense counsel knew that Dawkins had been arrested for robbery just prior to the trial in this case, neither he nor the District Attorney knew about several other older convictions of Dawkins. These convictions included robbery and conspiracy convictions, and convictions for theft and false reports to authorities incriminating another.[1]

On a prior occasion, this court summarized the Commonwealth's obligation to disclose impeachment material as follows:

> The United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), held that the government must volunteer "evidence favorable to an accused on request . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87, 83 S. Ct. at

1. The trial judge provided the following explanation of how the clerical mistake occurred:

> Dawkins had a Philadelphia police photo number that he was given at the time of his first arrest in 1983. When he was arrested again just prior to his testimony at trial he was mistakenly given another *new* photo number. The record that was obtained by the prosecutor under this new number, therefore, indicated that the witness had no prior criminal record. The error was not discovered until the witness was arrested again well after the trial.

Commonwealth v. Hollman, No. 3311-3319, Sept. Term 1991, slip op. at 4 (C.P. Phila. Aug. 4, 1994) (Savitt, J.).

1196-97. In *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972), the Court expanded this rule to include evidence that may be used to impeach an important government witness. In short, the prosecution must disclose materials "that go to the heart of the defendant's guilt or innocence and materials that might affect the jury's judgment of the credibility of a crucial prosecution witness." *United States v. Hill*, 976 F.2d 132, 134-35 (3d Cir. 1992) (citing *Giglio*, 405 U.S. at 154, 92 S. Ct. at 766). Thus, in order to earn a new trial based on newly-discovered impeachment materials, the court must find that there is a reasonable probability that the result of the petitioner's trial would have been different had the defense been able to use the undisclosed material to cross-examine . . . [the government witness]. *See United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L.Ed.2d 481 (1985). In discovering whether a new trial is warranted, the court must consider the suppressed favorable evidence "collectively, not item by item." *Kyles v. Whitley*, 514 U.S. 419, __, 115 S. Ct. 1555, 1567, 131 L.Ed.2d 490 (1995).

Johnston v. Love, 940 F. Supp. 738, 762-63 (E.D.Pa. 1996), *aff'd*, 118 F.3d 1576 (3d Cir. 1997), *petition for cert. filed*, __ U.S.L.W. __, (U.S. Sept. 2, 1997)(No. 97-6130).

In the instant case, the record demonstrates that the prosecutor did not have actual knowledge that the criminal record of Andre Dawkins was incomplete due to a mistake in police record-keeping. Nonetheless, petitioner argues that the prosecutor should be held responsible for failing to transmit to

the defense the entire criminal history of Andre Dawkins. It is true that the Supreme Court and the Third Circuit have held that under certain circumstances a prosecutor may be accountable for failure to disclose *Brady* or *Giglio* material when the information was not known to the prosecutor but was known to police investigators. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 438 (1995); *Giglio v. United States*, 405 U.S. 150, 154-55 (1972). In *United States v. Perdomo*, 929 F.2d 967 (3d Cir. 1991), the Third Circuit reversed the defendant's conviction for drug offenses, after finding that a Virgin Island prosecutor did not disclose the criminal record of a key government witness. The court held that the prosecutor should have known of a witness' criminal record because the information was "readily available" to him in that it was contained in local Virgin Island records which the prosecutor failed to search.

The circumstances of the case at bar differ significantly from those the Third Circuit confronted in *Perdomo*. Here, the District Attorney and police investigators did search and disclose a portion of Dawkins' criminal history, but due to a clerical mistake, were unable to retrieve complete information. In *Perdomo*, the prosecutor failed to take the minimal steps necessary to acquire the criminal record of the government witness. In any event, this court need not reach the issue of whether the Commonwealth should be responsible for failure to disclose the *Giglio* material, because even if the prosecution had disclosed all of Dawkins' criminal convictions, these new facts would not have reasonably affected the outcome of the trial.

At trial, defense counsel engaged in extensive cross-examination of Andre Dawkins about his prior criminal history. Defense counsel confronted Dawkins with a record of

an arrest for theft in 1990 and his use of an alias in connection with that arrest. Although Dawkins denied that he was the person arrested for this particular offense, he admitted, "I have summaries. I have a burglary. I ain't been a saint all my life." Dawkins was further asked about his recent arrest for robbery and whether he was promised lenient treatment in return for his testimony in this case. Dawkins responded that he was innocent and that he had been persecuted and "harassed" by police over the years. (N.T. 4/28/93, 1262-79, 1355.) Dawkins further admitted on cross-examination that bench warrants had been issued for him in several "summary cases." When further questioned, he identified three earlier arrests: "One of them I should go to court for, but the other two I was supposed to be creating a disturbance at 3:30 in the morning inside the concourse, the underground concourse." (N.T. 4/29/94, at 1273-74.) From this testimony, the jury could have inferred that Dawkins had a lengthy history of trouble with the law. Evidence of Dawkins' additional convictions would merely be cumulative to Dawkins' admissions about his criminal history.

In a further effort to highlight Dawkins' criminal record, the defense called a Philadelphia Police Department detective who arrested Dawkins for robbery just a few days before petitioner's trial. The detective told the jury that he checked Dawkins' criminal history and it appeared as if Dawkins had been arrested before under an alias and that Dawkins had been the target of at least three bench warrants. The detective further stated that Dawkins had confessed to committing the recent burglary, but he told the detective that he believed he was immune from prosecution because he was a witness in the case against petitioner. The detective also stated that Dawkins told him that he was addicted to crack cocaine. (N.T. 4/29/94 at 1551-71.) The testimony showed that Dawkins had lied when

he said he was innocent of the burglary charge. Moreover, this testimony demonstrates that defense counsel was able to fully explore Dawkins' motivation for testifying, including a lengthy discussion of his pending burglary charges. Dawkins' remaining undisclosed convictions were closed, and his punishment complete, so defense counsel could not have argued that Dawkins had fabricated testimony merely to gain favor with respect to those charges.[2]

To the extent that evidence of additional convictions would have impeached Dawkins' credibility, they would have been cumulative since defense counsel's cross-examination significantly called in question the believability of Dawkins' testimony. Dawkins' testimony was rife with inconsistencies. For example, Dawkins had claimed that he was illiterate, but defense counsel was able to establish that he signed the statement he gave to the police in this case and that he had graduated from high school. Furthermore, Dawkins admitted that he had a history of mental illness and that he had been institutionalized and "didn't know who I was for seven months" and that he had taken medication for these problems. He admitted that he had not taken his medication at the time he witnessed the murder. (N.T. 4/28/93, at 1283-86.)

Furthermore, defense counsel was able to establish several inconsistencies between Dawkins' testimony at trial and the statements he had previously given to police. Defense counsel

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2. The court acknowledges that had defense counsel known of Dawkins' prior conviction for giving a false report to authorities, he could have argued that Dawkins had a history of falsely accusing another of crime. However, there was no evidence to suggest that Dawkins had any prior animosity or prejudice toward petitioner which would motivate him to falsely accuse petitioner of murder.

pointed out that Dawkins had once told police that he approached the petitioner before the shooting occurred, but at trial, he denied that had ever happened. At trial, Dawkins denied that he had passed the petitioner on the same side of the street before the crime occurred. However, this testimony directly contradicted his earlier statement to the police. Furthermore, Dawkins told the jury that he heard two shots and witnessed the shooting. But these claims again contradicted his earlier statement to the police. He had first told the police he heard three shots and did not witness the shooting. (N.T. 4/28/93, 1293-1300, 1332-33, 1359, 1362). In addition, Dawkins told the jury that the petitioner was wearing "lime-green shorts" at the time of the murder, but Deirdre Jones and a police detective stated that petitioner was wearing "long pants". (N.T. 4/28/93 at 1292-93; 4/26/93 at 1056; 4/27/93 at 1101.)

Finally, while Dawkins was an important witness for the Commonwealth, the prosecution offered an abundance of other evidence supporting petitioner's conviction. As noted earlier, the Commonwealth presented the testimony of Deirdre Jones, who actually heard the petitioner tell of his plans to rob someone, watched while defendant got out of the van, heard gunshots, and sped away with him as he attempted to escape. Several other bystanders corroborated Dawkins' version of the events, and established that the murderers escaped in a white Chevrolet Blazer with a license plate beginning with the letters "YZA." In fact, petitioner and Deirdre Jones were arrested minutes later, only a few blocks away, traveling at a "high rate of speed" in a white Blazer with a license plate beginning "YZA". The police officer who arrested petitioner testified that petitioner was highly agitated at the time of the arrest. Later, when a police officer confronted petitioner with Jones' statement incriminating him in the murder, petitioner blurted out, "I told the bitch to keep her mouth shut, shit." Finally, the

bullet recovered from the victim's body was compatible with the .38 caliber gun found in the petitioner's apartment.

Given the extensive impeachment of Dawkins' credibility by defense counsel, as well as the other evidence pointing to petitioner's guilt, this court concludes that there is no reasonable probability that the outcome of the trial would have been different if defense counsel had known the full criminal history of Andre Dawkins. To borrow Judge Pollak's words from another habeas corpus case, "there is not a reasonable probability that the small margin of impeachment provided by . . . [the undisclosed criminal convictions] would have altered the result of the petitioner's trial." *Johnston*, 940 F. Supp. at 750. Because petitioner's right to due process was not infringed, his petition should be denied.[3] Accordingly, the court makes the following:

RECOMMENDATION

AND NOW, this 4th day of November, 1997, the court respectfully recommends that the petition for writ of habeas corpus be denied without an evidentiary hearing and that *no* certificate of appealability be granted.

BY THE COURT:

s/ Thomas J. Rueter
THOMAS J. RUETER
United States Magistrate Judge

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3. Petitioner also argues that the failure to disclose Dawkins' criminal record violated due process of law, because the court's jury instructions would have taken on a different meaning if Dawkins' criminal record had been known to the jury. (Petitioner's Memorandum of Law, at 33). This claim is substantively identical to petitioner's *Brady* claim and, for the reasons stated earlier, should be rejected as meritless.

APPENDIX D — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, EASTERN DIVISION DENYING PETITION FOR ALLOWANCE OF APPEAL ENTERED APRIL 1, 1996

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 616 E.D. ALLOCATUR
DKT. 1995

COMMONWEALTH OF PENNSYLVANIA

V.

CHESTER HOLLMAN,

PETITIONER

Petition for Allowance of Appeal
from the Superior Court

ORDER

PER CURIAM:

AND NOW, this 1st day of April, 1996, the Petition for Allowance of Appeal in the above matter is denied.

APPENDIX E — ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA DENYING REQUEST FOR REARGUMENT DATED JULY 20, 1995

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 02833 Philadelphia 1994

COMMONWEALTH OF PENNSYLVANIA

v.

CHESTER HOLLMAN,

Appellant

ORDER

The court hereby denies the application filed May 30, 1995, requesting reargument/reconsideration of the decision dated May 17, 1995.

PER CURIAM

DATE: July 20, 1995

APPENDIX F — JUDGMENT AND MEMORANDUM OF THE SUPERIOR COURT OF PENNSYLVANIA DATED AND FILED MAY 17, 1995

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 02833 PHILADELPHIA 1994

COMMONWEALTH OF PENNSYLVANIA

V.

CHESTER HOLLMAN, APPELLANT

Appeal from the Judgment of Sentence, July 19, 1994, In the Court of Common Pleas of Philadelphia County, Criminal, Nos. 3313-3319 September 1991.

BEFORE: BECK, TAMILIA, and CERCONE, JJ.

JUDGMENT

ON CONSIDERATION WHEREOF, *it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of* PHILADELPHIA *County be, and the same is hereby* AFFIRMED.

BY THE COURT:

s/ [illegible]
PROTHONOTARY

Dated: MAY 17, 1995

Appendix F

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 02833 PHILADELPHIA 1994

COMMONWEALTH OF PENNSYLVANIA

V.

CHESTER HOLLMAN, APPELLANT

Appeal from the Judgment of Sentence, July 19, 1994, In the Court of Common Pleas of Philadelphia County, Criminal, Nos. 3313-3319 September 1991.

BEFORE: BECK, TAMILIA, and CERCONE, JJ.

MEMORANDUM:

Appellant-defendant was found guilty of Second Degree Murder, Possession of An Instrument of Crime and Criminal Conspiracy. Appellant and an accomplice robbed and killed a man in Philadelphia. Appellant was apprehended a few minutes after the crime. There were several eyewitnesses to the shooting.

On appeal, appellant's issue centers around a witness, Andre Dawkins. Dawkins was standing outside a convenience store across the street, saw the shooting and had a good view of appellant's face.

Due to a clerical error in the police department which was uncovered several weeks after trial, the District Attorney did not know that Dawkins had two different identification numbers in the police computer system. Because of this error, when

defense counsel asked for Dawkins's criminal record, he received an incomplete report. While defense counsel knew that Dawkins had been arrested for Robbery just before the trial in this case, neither he nor the district attorney knew about several other older convictions of Dawkins.

The trial judge held extensive post-trial hearings. He concluded that Dawkins's earlier convictions which neither the District Attorney nor defense counsel knew about constituted newly discovered evidence. The court refused to grant a new trial because it concluded that even if defense counsel knew about the earlier convictions, the result of the trial would not have been different. The trial court underscored the strength of the Commonwealth's case.

On appeal, appellant raises three issues:

> 1. Was the failure to provide the defense with an accurate criminal record for alleged eyewitness Andre Dawkins when specifically requested to do so a *Brady* violation that may not be avoided by a finding of negligence on the part of the police?
>
> 2. Even if the discovery of Dawkins' [sic] lengthy criminal record is deemed to be after discovered evidence is appellant entitled to a new trial under the more stringent standard that would apply?
>
> 3. Did the absence of Dawkins' prior criminal record deny appellant due process of law because it was material to a full understanding of the court's charge and in the absence of Dawkins' prior record the jury could not even consider major arguments in appellant's

> favor and had they been able to consider those arguments is it more than likely that a different verdict would have been compelled?

Appellant's Brief at 7.

Appellant first asserts that *Brady v. Maryland*, 373 U.S. 83 (1963), was violated thereby depriving appellant of due process. We find that *Brady* is inapplicable. The district attorney had no knowledge of the missing information until after the trial was over and, of equal importance, the full criminal history was impeachment evidence and not exculpatory evidence. *See Commonwealth v. Battiato*, 619 A.2d 359 (Pa.Super. 1993) and *Commonwealth v. Redmond*, 577 A.2d 547 (Pa.Super. 1990).

As to appellant's second issue, we conclude that the trial court was correct that Dawkins's earlier criminal record constituted after-discovered evidence. Appellant is not entitled to a new trial. A new trial will only be granted if the after-discovered evidence is likely to result in a different verdict. A review of the record clearly indicates that the appellant has not satisfied the standard for a new trial based on after-discovered evidence. *Commonwealth v. Boyle*, 625 A.2d 616 (Pa. 1993).

Appellant's final issue is somewhat cryptic. He argues that Dawkins's prior criminal record denied appellant due process of law because it was material to a full understanding of the court's charge and in the absence of Dawkins's prior record, the jury could not even consider major arguments in appellant's favor. He further suggests that had the jury been able to consider these different arguments, it is more likely that a different verdict would have been compelled. We disagree. We point out that given the facts of this case and the strong testimony

against appellant, Dawkins's prior record would not have changed the outcome of this case. Dawkins's prior record could not have caused the jury to misunderstand the court's instructions. Appellant identifies five instructions which he claims somehow were tainted by the missing evidence. We can find no basis for appellant's claim. We find this argument totally devoid of merit.

Judgment of sentence affirmed.

APPENDIX G — OPINION OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, TRIAL DIVISION DATED AUGUST 4, 1994

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
TRIAL DIVISION

SEPTEMBER TERM, 1991

NO. 3311-3319

COMMONWEALTH OF PENNSYLVANIA

v.

CHESTER HOLLMAN, III

OPINION

SAVITT, J. AUGUST 4, 1994

FACTS AND HISTORY

On August 20, 1991, at approximately 1:00 a.m., the victim Jung Ho and his friend Junko Nihei were walking in the vicinity of 22nd and Walnut Streets in Philadelphia, when they were stopped by two young men, one of whom held a gun. The two men pushed the victim down on the pavement and shot him, one man holding the victim's feet, the other straddling his chest. The bullet penetrated Jung Ho's heart and lungs, causing his death. The two men then took money from the victim's pockets and fled, initially on foot and then in a while Chevrolet Blazer vehicle.

Appendix G

Police received and responded to a radio call to apprehend four individuals driving in a white Bronco with a license tag beginning with the letters YZA which had been observed by a cab driver who saw the shooting and followed the defendants from the scene, and gave the license number to his dispatcher who in turn gave it to police. Officer Lloyd stopped the white Blazer on Van Pelt Street between 21st and 22nd Streets and arrested the defendant, Chester Hollman, III and Deidre Jones just minutes after the incident.[1]

The defendant was tried by this court and a jury from April 19 to May 4, 1993 following which he was found guilty of Second Degree Murder, Possession of an Instrument of a Crime, Robbery, a felony in the first degree and Conspiracy. Trial counsel Gerald Stein timely filed post verdict motions, was permitted to withdraw and defendant retained Norris Gelman who filed supplemental motions and withdrew all previous motions.

OPINION

In his motions defendant argues that the prosecutor failed in his affirmative obligation to correct false and misleading testimony by Commonwealth witness Andre Dawkins as to his prior criminal record. Defendant further argues that trial counsel was ineffective for failing to secure Andre Dawkins' prior criminal record, for failure to secure Dawkins' past Mental Health Reports and not using expert testimony to show Dawkins suffered from a major mental illness. Finally, defendant argues ineffectiveness for trial counsel's failure to object to the charge of the court when it defined reasonable doubt.

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1. The other man and his female companion had left the vehicle shortly after it fled the scene of the crime.

Appendix G

With respect to the issue of ineffectiveness, counsel is presumed effective and defendant bears the burden of proving ineffectiveness. *Commonwealth v. Williams*, 524 Pa. 404, 573 A.2d 536 (1990); *Commonwealth v. McNeil*, 506 pa. 607, 4987 A.2d 802 (1985); *Commonwealth v. Stinnet*, 356 Pa. Super. 83, 514 A.2d 154 (1986). Ineffectiveness claims are evaluated under three criteria: first, defendant must show that the underlying claim is of arguable merit. *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973 (1987); *Commonwealth v. Lewis*, Pa. Super, 634 A.2d 633 (1993); *Commonwealth v. Jones*, Pa. Super., 636 A.2d 1184 (1994). Once past the first threshold, the defendant must then establish that the particular strategy counsel chose had no reasonable basis designed to effectuate his client's best interests. *Commonwealth v. Jones*, supra; *Commonwealth ex. rel. Washington v. Mahoney*, 427 Pa. 599, 235 A.2d 349 (1967); *Commonwealth v. Strutt*, 425 Pa. Super. 95, 624 A.2d 162 (1993). The third showing is that counsel's omission or commission prejudiced the defendant. *Commonwealth v. Pierce*, supra; *Commonwealth v. Durst*, 522 Pa. 2, 559 A.2d 504 (1989); *Commonwealth v. Davis*, 518 Pa. 77, 541 A.2d 315 (1988). In order to show prejudice a defendant must demonstrate that there is a reasonable possibility that, but for counsel's unprofessional errors, the result of the trial would have been different. *Commonwealth v. Pierce*, supra.

To show that counsel was ineffective for failing to call a witness defendant must show not only that counsel was aware of the witness' existence, but also that the testimony of the witness would have been helpful to him at trial and that counsel had no reasonable basis for not calling him. *Commonwealth v. Jasper*, 526 Pa. 497, 587 A.2d 705 (1991); *Commonwealth v. McNeil*, supra; *Commonwealth v. Leonard*, 499 Pa. 357, 453 A.2d 587 (1982).

Appendix G

Defendant argues that he is entitled to a new trial because trial counsel did not have access to the prior criminal record of Commonwealth witness Andre Dawkins for cross examination. This argument has no merit. The record shows that neither the defense nor the prosecutor at the time of trial was aware that the witness had prior criminal convictions because of a clerical error by the police department.[2] That the witness had a prior criminal record was not discovered until well after the trial was finished and the criminal record is, therefore, after discovered evidence. Counsel cannot be deemed ineffective for failing to obtain something he did not know existed.[3]

After discovered evidence is a basis for new trial where that evidence has been discovered after trial and could not have been obtained prior to conclusion of the trial by exercise of reasonable diligence. The evidence must be of such a nature that a different verdict will likely result if a new trial is granted. *Commonwealth v. Boyle*, 533 Pa. 360, 625 A.2d 616 (1993); *Commonwealth v. Lambert*, 529 A.2d 320, 603 A.2d 568, *rehearing denied* (1992); *Commonwealth v. Chambers*, 528 Pa. 558, 599 A.2d 630, *cert. denied Pennsylvania v. Chambers*, 112 S.Ct. 2290 (1991); *Commonwealth v. Tizer*, 525 Pa. 315, 580 A.2d 305 (1990).

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2. Dawkins had a Philadelphia police photo number that he was given at the time of his first arrest in 1983. When he was arrested again just prior to his testimony at trial he was mistakenly given another *new* photo number. The record that was obtained by the prosecutor under this new number, therefore, indicated that the witness had no prior criminal record. The error was not discovered until the witness was arrested again well after the trial.

3. Obviously where the Commonwealth was unaware that the testimony was misleading it cannot be charged with failure to disclose it or to correct testimony. Accordingly, defendant's first averment of error has no merit.

Appendix G

In the case at bar trial counsel cross-examined Dawkins extensively about his ability to observe and his memory of the incident. Furthermore, there was ample evidence to convict defendant even without Dawkins' testimony. Defendant was not prejudiced by not having the criminal record and is not entitled to a new trial on this basis.

Defendant's reliance on *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny for the proposition that he is entitled to a new trial because of the missing criminal record is inapposite here. Where, as here, the prosecutor did not possess the missing information he cannot be charged with failure to disclose it. Even if the prosecutor could be charged with the duty to turn over the complete criminal record,[4] the defendant must show that the omitted evidence would have created a reasonable doubt in the minds of the fact finder. *Augurs v. U.S.*, 427 U.S. 97 (1976). Again, in the case at bar there was ample evidence to convict defendant even without Dawkins' testimony. Accordingly, there is no showing that the use of Dawkins' complete criminal record on cross-examination would have created a reasonable doubt and defendant is not entitled to a new trial on this basis.

Defendant's argument that trial counsel was ineffective for failing to call a mental health expert to obtain mental health records to impeach Andrew Dawkins has no merit. No mental health expert was called to testify at the ineffectiveness hearing so that is no showing that such testimony would have been helpful to defendant's case. Further, there is no showing that the mental health records presented at the ineffectiveness

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4. Defendant argues that the prosecutor had such a duty because the clerical error by the police in giving Dawkins two photo numbers was state action.

hearing would have been useful in impeaching Dawkins' credibility because these records do not in themselves demonstrate that Dawkins' ability to observe, to relate what he observed or to tell the truth was impaired by his mental illness. Accordingly, defendant is not entitled to a new trial on this basis.

Finally, the court's instruction to the jury on reasonable doubt was in compliance with present law and there was no reason for trial counsel to object to it. Trial counsel was not ineffective and defendant is not entitled to a new trial on this basis.

For the reasons set forth herein defendant's motions for a new trial were denied.

s/ [illegible]
J.